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DEVELOPMENT'S VICTIM OR ITS BENEFICIARY?: THE IMPACT OF OIL AND GAS DEVELOPMENT ON THE FORT BERTHOLD INDIAN RESERVATION

RAYMOND CROSS*

*"With an education, you become the white man's equal. Without it you remain his victim."*¹ *Crow Chief, Plenty Coups*

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1. Douglas Nelson & Jeremy Johnston, *Janine Pease Pretty-on-Top/Crow*, in *THE NEW WARRIORS: NATIVE AMERICANS LEADERS SINCE 1900* (R. David Edmunds ed. 2004).

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I. INTRODUCTION

North Dakota can, according to oil tycoon Harold Hamm, become the next Saudi Arabia.² He estimates that its Bakken oil and gas fields, once fully developed, will yield some twenty-four billion barrels of oil.³ The on-

2. Stephen Moore, *The Weekend Interview with Harold Hamm: How North Dakota Became Saudi Arabia*, WALL ST. J., Oct. 1, 2011, at A13.

3. *Id.*

going development of this gigantic and prolific oil field has already helped propel the United States into third place among the world's oil producing nations.⁴ However, if North Dakota will soon become the next Saudi Arabia, as Hamm claims, then the Fort Berthold Indian Reservation, which sits directly on top of the Bakken formation, deserves to be called little Saudi Arabia.⁵

My article, however, tells a somewhat less positive, but possibly more realistic, story of oil and gas development in North Dakota than the one told by Harold Hamm in his recent interview with the Wall Street Journal. My goal is to assess whether oil and gas development on the Fort Berthold Indian Reservation—given those critical geographic, legal and socio-cultural differences which set it apart from the rest of North Dakota—will bring with it potentially devastating and unmanageable impacts that may overwhelm the tribal people of that reservation. My article, therefore, seeks to fill an analytic gap in the existing oil and gas scholarship that has not, in my estimation, given sufficient regard to development's unique risks and impacts in Indian Country.

Three interrelated phenomena help explain why large scale oil and gas development has come to western North Dakota and the Fort Berthold Indian Reservation. First, the dramatic rise in the world price of oil has rendered it profitable to develop the oil and gas resources of the Bakken formation.⁶ Second, the use of two new, or re-adapted, oil and gas extraction technologies — horizontal drilling and hydraulic fracturing — have made the development of that formation technically feasible.⁷ Third, the United States Geological Survey's (USGS) recent substantial upward revision of its estimate of the potentially recoverable amount of oil and gas reserves in the Bakken formation piqued the interest of many hitherto wary development companies.⁸

4. Hamm asserts that with the right set of national energy policies the United States could be "completely energy independent by the end of the decade." *Id.* As befits "a man who thinks big," he also claims that if the federal government would allow more drilling on its lands and waters that it "could over time raise \$18 trillion in royalties." *Id.*

5. See Eloise Ogden, *Fort Berthold Reservation Prime Bakken Area*, MINOT DAILY NEWS (Apr. 24, 2011), http://www.mhanation.com/main/news/2010/2010_04_27. Veteran news reporter Eloise Ogden asserts that the Fort Berthold Reservation sits "right on top of the [geologic] formation thought to be the largest continuous oil reserve in the lower 48 states." *Id.* She also reports that the United States Geological Survey now estimates that formation holds approximately three hundred billion barrels oil. *Id.*

6. See U.S. Energy Information Admin, *Spot Prices*, EIA.GOV, (Aug. 29, 2012) http://www.eia.gov/dnav/pet/pet_pri_spt_s1_d.htm.

7. See U.S. ENERGY INFORMATION ADMIN. TECHNOLOGY-BASED OIL AND NATURAL GAS PLANS: SHALE SHOCK! COULD THERE BE BILLIONS IN THE BAKKEN? 2, 5 (2006).

8. See LAWRENCE O. ANNA ET. AL., ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF THE WILLISTON BASIN PROVINCE OF NORTH DAKOTA, MONTANA, AND SOUTH

According to recent oil and gas statistics, the Fort Berthold Indian Reservation sits directly on top of some three hundred billion barrels of oil.⁹ Furthermore, given today's relatively sophisticated extraction technologies, some experts estimate that over twenty-four billion barrels of oil can be economically recovered from the formation.¹⁰ In just the Mandaree and Shell Creek segments of the reservation alone, it is forecasted that some 1600 to 3000 new wells will be drilled over the next several years.¹¹ Development's present impact is demonstrated by the fact that over 2500 oil trucks a day use the reservation's few, narrow, and now heavily damaged rural roadways.¹² However, within two years, the level of truck usage is expected to at least triple to over 7500 oil trucks a day.¹³

My article's thesis is that the tribal people confront quantitatively and qualitatively different risks and impacts from oil and gas development on the Fort Berthold Indian Reservation. Indeed, North Dakota and the federal government may take a different attitude towards this development because they, unlike the tribal people, are not directly confronted by its risks and impacts. A brief assessment of these two governments' attitudes toward development may help reveal their different perception of its impacts. North Dakota sees oil and gas development in a generally positive light. After all, the development brings with it high-paying jobs, significant oil and gas revenues, and substantial funding for new social options for both its present day citizens as well as its future citizens. For these very good reasons, North Dakota can afford to regard development's impacts as presenting only manageable and highly localized effects within a contained,

DAKOTA, FACT SHEET, U.S. GEOLOGICAL SURVEY (2008); *see also* U.S. Dept' of Interior, U.S. Geological Survey, *3 to 4.3 Billions of Barrels of Technologically Recoverable Oil Assessed in North Dakota and Montana's Bakken Formation—25 Times More than 1995 Estimate*, USGS, (Apr. 10, 2008), <http://www.usgs.gov/newsroom/article.asp?ID=1911>.

9. *See* Ogden, *supra* note 5.

10. *See* Moore, *supra* note 2, at A13. Harold Hamm estimates the Bakken field, at full development, will produce more than twenty-four billion barrels of oil. *Id.* He also claims that this oil and gas field "is almost twice as big as the oil reserves in Prudhoe Bay, Alaska" *Id.*

11. Jodi Rave, *Fort Berthold Reservation to Provide Backdrop for International Discussion on Energy and Climate Change*, TODAYMEDIANETWORK (June 30, 2011), <http://indiancountrytodaymedianetwork.com/2011/06/30/fort-berthold-reservation-to-provide-backdrop-for-international-discussion-on-energy-and-climate-change-41176>.

12. Eloise Ogden, *Three Affiliated Tribes Ask BIA for Help with Highway Safety Issues*, MINOTDAILYNEWS.COM (Feb. 22, 2011), <http://www.minotdailynews.com/page/content.detail/id/552162/Fort-Berthold-roads.html?nav=5010>.

13. *See North Dakota Flight Sparks Discussion on Impact of Oil Boom*, LIGHTHAWK (Sept. 2010), <http://www.lighthawk.org/WayPoint/WayPoint%20September%202010.pdf>. Some commentators contend that too little attention has been paid to the non-economic impacts—including the public safety impacts—of oil development on the health and well being of both the tribal and non-tribal people of this region of North Dakota. For example, the major reservation road, Highway 23 that connects the reservation towns of New Town and Parshall, has the dubious reputation of being "the most dangerous road in the world without a bomb hidden on it." *Id.*

several countywide area, in the western part of that state. It can also afford to manage its undesirable local effects through the provision of targeted financial aid to those impacted western counties. Its financial goal is to, more or less, enable those local people to cope with those familiar boomtown-type impacts of large-scale development. These local impacts include, for example, heavily damaged roads, overwhelmed school systems, overburdened municipal waste water treatment systems, soaring housing and food prices, new public safety needs, as well as the understandable culture shock of local residents who must deal with the influx of so many outside oil field workers and their families, who have migrated to the state from far flung parts of the nation.¹⁴ While many locals do welcome this development, there are also those long established farmers and ranchers who decry this development's physical and social impacts on their communities and their cherished way of rural life.¹⁵

Yet, North Dakota also rightly asserts that it has wide-ranging regulatory authority over any foreseeable and undesirable environmental impacts that may arise in the future course of oil and gas development within the western part of the state.¹⁶ Furthermore, its environmental regulatory agencies do affirmatively monitor all aspects of the oil

14. An elderly lady's sad situation, that of Ms. Lois Sinness, symbolizes the development related distress experienced by many of those local residents. James Macpherson, *Oil Boom Raises Rents, Pushes Seniors Out*, PITTSBURGH POST-GAZETTE, Nov. 16, 2011, at A4. Lois had lived for eighty-two years in her hometown of Williston, North Dakota. *Id.* In November 2011, she left that town in tears, "towing a U-Haul packed with every possession." *Id.* Her landlord had tripled her \$700 a month rent due to the demand for housing that has been generated by the state's oil boom. *Id.* However, many other elderly residents of Williston are in that same predicament. *Id.* Williston, like other oil boomtowns in western North Dakota, have been transformed into an "industrial park" with its once empty streets now "clogged with 18-wheelers." *Id.* Ryan Holeywell contends the "Bakken boom has brought a population surge to the state, and the onslaught of new residents is straining public resources nearly to the breaking point." Ryan Holeywell, *North Dakota's Oil Boom is a Blessing and a Curse*, GOVERNING (Aug. 2011), <http://www.governing.com/topics/energy-env/north-dakotas-oil-boom-blessing-curse.html>. He also contends that "the other major impact of the industry is the damage to the country road system. . . ." *Id.* He also cites a transportation study that "estimates that fixing the roads will require an investment of more than \$900 million over the next 20 years." *Id.* However, he contends that the "biggest struggle in the region, though, is the shortage of housing." *Id.*

15. Rancher Donny Nelson "inherited his concerns about what drilling for oil might do to this wildest of North Dakota geography" Stephen J. Lee, *Rancher Looks Back on Change to Family's Land*, RUNNING WITH OIL (Aug. 18, 2010), <http://www.runningwithoil.com/?p=416>. He recounts that "hydrogen sulfide from early oil wells [during the 1980s oil boom] sickened his uncle, killed the family's cattle and corroded the barbed wire fences and steel buildings and equipment." *Id.*

16. See generally N.D. CENT. CODE ch. 38-08 (2004) (relating to control of gas and oil resources). North Dakota statutorily prohibits the waste of its oil and gas resources. *Id.* § 38-08-03. It has also delegated to its oil and gas commission the regulatory jurisdiction and authority to enforce its oil and gas laws against all persons and property within the state. *Id.* § 38-08-04. Furthermore, the oil and gas commission is authorized to impose substantial civil penalties on any person who violates its rules, regulations, or orders. *Id.* § 38-08-16(1).

companies' development and production processes and protocols so as to either avoid or to quickly remedy any substantial threat to the state's environmental interests and values.¹⁷ These same agencies can, and have, levied hefty fines on those oil companies that have allowed substantial environmental damage to occur.¹⁸

North Dakota's fulsome embrace of oil and gas development likely makes economic and socially rational sense. However, my article's goal is to assess whether the tribal people of the Fort Berthold Indian Reservation should greet the development with equal ardor. Given this development's potentially severe impacts on the tribal people's environmental, public health, safety, and cultural interests, they must quickly develop those appropriate legal and regulatory means that will enable them to either avoid or reasonably mitigate these expected impacts.

The federal government, on the other hand, as evidenced by its Indian energy legislation, views oil and gas development on the Fort Berthold Indian Reservation as a legitimate means for helping the tribal people to achieve their goal of economic self-sufficiency.¹⁹ Furthermore, the federal government seems to regard oil and gas development throughout the United States as an appropriate means whereby the nation can achieve its long sought goal of energy independence.²⁰ The federal government may also choose to use some of its oil and gas derived revenues to build America's green energy future.²¹

17. *Id.* § 38-08-04; see also N.D. Indus. Comm., Dep't of Mineral Res., *North Dakota Oil and Gas Division*, DMR, <https://www.dmr.nd.gov/oilgas/> (last updated Aug. 18, 2012).

18. See Patrick Springer, *Who's in Charge?*, *RUNNING WITH OIL* (Aug. 16, 2010), <http://www.runningwithout.com/?p=362>. A 2006 environmental disaster—a defective pipe spilled about a million gallons of highly concentrated salt water into Charbonneau Creek—“delivered a wake-up call to oil and gas regulators in North Dakota . . .” *Id.* In response, those regulators identified some 397 active oil wells that presented a serious risk of substantial oil or related contaminant based spills into the environment. *Id.* However, the required regulatory response to these risks has strained the state's regulatory staff at its environmental health and oil and gas offices. *Id.* Despite the strain, the regulators emphasize voluntary compliance on behalf of the oil and gas industry and use fines and fees as only a last resort. *Id.* Nonetheless, the regulators have levied some large fines on non-complying oil and gas companies as evidenced by the \$171,750 fine levied against Zenergy Oil for the Charbonneau Creek spill. *Id.*

19. See Indian Mineral Development Act of 1982, Pub. L. No. 97-382, § 1, 96 Stat. 1938, 1938 (1982) (codified at 25 U.S.C. §§ 2101-08 (2006)); Indian Tribal Energy and Self-Determination Act, Pub. L. No. 109-58, § 503(a), 199 Stat. 594, 764 (2005) (codified at 25 U.S.C. §§ 3501-06).

20. See Moore, *supra* note 2, at A13.

21. See *Id.* Harold Hamm recently discussed oil and gas development with President Obama. *Id.* He reports that Obama told him “oil and gas will be important for the next few years. But we need to go on to green and alternative energy.” *Id.* Hamm, as well, decried the White House's proposal to raise \$40 billion in taxes in the oil and gas industry apparently to help fund the nation's transition to its green energy future. *Id.*

However, today's Indian energy legislation is deficient in providing two things that Indian tribes need the most to be able to successfully manage oil and gas development within their borders. First, the legislation does not provide them with any new federally delegated authority to regulate the development's risks and impacts within Indian Country. Second, the legislation does not provide them with sufficient and readily available funding and technical assistance. Without such federal help, the Indian tribes will likely be unable to fully develop their capacity to exercise regulatory oversight over development within Indian Country.²² Furthermore, the recent legislation also substantially limits federal liability for any new energy development initiatives that the tribes may undertake pursuant to these statutes.²³

II. WHY DEVELOPMENT IS DIFFERENT ON THE FORT BERTHOLD INDIAN RESERVATION

Fort Berthold's geographic, legal, and socio-cultural differences set it apart from the rest of North Dakota. These differences include place-based considerations that motivated the federal government and the tribal people to agree to, in their 1886 treaty, set aside this geographic area for the exclusive use and occupancy of the Three Affiliated Tribes, now known as the Mandan, Hidatsa, and Arikara Nation.²⁴ This area contains some of the tribal people's most valued and revered sacred sites. These considerations, among others, helped persuade the Three Affiliated Tribes to accept this remnant portion, less than one million acres in size, of its once vast tribal land holdings.²⁵ The Three Affiliated Tribes' original tribal homelands, established by the Fort Laramie Treaty of 1851, included more than 12.5 million acres and stretching from the Canadian border to the Powder River region of Wyoming.²⁶

22. See Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, NAT. RESOURCES & ENV'T, Summer 2007, at 55, 56 ("Congress will never commit the resources needed to provide comprehensive, timely, and high-quality expertise to tribes as they evaluate and undertake mineral development.").

23. *Id.* (contending that the most recent Indian energy statute declares that "[t]he United States shall not be liable, however, for losses suffered by a tribe from application of a negotiated term included in a lease, business agreement, or right-of-way approved by a tribe pursuant to a [Tribal Energy Resource Agreement]").

24. See Roy W. Meyer, *Fort Berthold and the Garrison Dam*, 35 J. N. PLAINS 223, 223 (Summer/Fall 1968). A Bureau of Indian Affairs investigator remarked upon the tribal people's great attachment to their lands, saying that the "[p]eople and land make a virtually unbroken social and geographic unit." *Id.*

25. See *id.*

26. *Id.* at 223-24. The Treaty confirmed the tribal people's "claim to the entire right bank of the Missouri from the mouth of the Heart River to the mouth of the Yellowstone, and to a vast

There are several practical facts that make development different on the Fort Berthold Indian Reservation. The reservation's traditionally oriented, allottee owned, farming and ranching lands will bear the brunt of future oil and gas development.²⁷ Also, the development will unevenly impact many small and interspersed reservation-based land holdings that are held in a variety of differing legal tenures (e.g., tribally-owned lands, federally-owned lands, allottee-owned lands, and non-Indian-fee-owned lands).²⁸ Furthermore, the typical allotted mineral owner, due to the highly fractionated nature of her mineral interest, will generally receive only a small financial benefit from any oil and gas development that may occur on her lands.²⁹

These practical facts alone may serve to distinguish development on Fort Berthold from elsewhere in North Dakota. But other, less obvious, factors greatly magnify development's impacts and risks on Fort Berthold. It is these less obvious factors that threaten to render development unmanageable on that reservation, including the tribal people's binding geographic ties to Fort Berthold; the tribal people's geographically constrained sovereign rights on Fort Berthold; and the tribal people's longstanding socio-cultural ties to Fort Berthold.

A. THE TRIBAL PEOPLE'S UNBREAKABLE GEOGRAPHIC TIES TO THE FORT BERTHOLD INDIAN RESERVATION

The Fort Berthold Indian Reservation is the last remnant of the tribal people's once vast tribal homelands. In 1851, their lands exceeded 12.5 million acres in area and stretched from the present day Canadian border to the Powder River region of Wyoming.³⁰ Their once vast tribal homelands were substantially diminished by a series of later federal treaties and land takings.³¹ Today, their remaining territory is less than one million acres in size, and much of the remaining acreage is owned in fee status by today's

hinterland enclosed by these streams and a vaguely described line from the mouth of the Powder River to the headwaters of the Heart." *Id.* at 223.

27. Rave, *supra* note 11. Lyle Gwin, a tribal environmental official, reported that between 1600 to 3000 oil and gas wells will soon be drilled in a traditionally oriented farming and ranching area—known as the Mandaree segment—of the reservation. *Id.*

28. Ogden, *supra* note 5. "[Indian] allottees own about 320,000 acres and the tribe owns about 210,000 acres of almost all trust lands, with the rest a mixture of predominantly fee land, with some U.S. Army Corps of Engineers land also in it." *Id.*

29. *See id.* Ogden also asserts that due to the "highly fractionated [allottee-owned] land base, it [is] almost impossible for companies to gather the approval of all the landowners of any given tract." *Id.*

30. Meyer, *supra* note 24, at 224.

31. *Id.* at 224-25.

descendants of the Scandinavian and other homesteaders who entered the reservation in the early twentieth century.³²

Fort Berthold's small land area, combined with the large scale of development now planned for that area, means that the tribal people will be directly confronted by development's recurring risks and impacts. Indeed, many tribal people must already deal with these impacts on a daily basis. Development, for them, has taken on a highly personalized and socially magnified character. As development grows on Fort Berthold, many more tribal people will be required to adjust their historic ways of life to accommodate its ubiquitous presence.³³

When viewed in traditional environmental justice terms, development on Fort Berthold seems to impose a disproportionate environmental burden on vulnerable tribal people.³⁴ However, the biggest potential adverse effect would be to erode the tribe's status as an economically viable, and culturally intact, political entity. Therefore, development, if it is not regulated in a legally and socially responsible manner, may threaten the tribe's cherished political and legal rights as a federally recognized Indian tribe. These larger tribal interests that may be threatened by unregulated development include the tribal people's treaty-based geographic ties to their lands; the tribal people's geographic-based rights of territorial sovereignty over their lands; and the tribal people's geographic-based socio-cultural ties to their lands.

1. *Their Treaty-Based Geographic Ties to Fort Berthold*

The tribe is obligated, by its 1886 treaty, to use its tribally reserved lands, particularly its highly fertile farming and ranching lands along the Missouri River, as the means of achieving economic self-sufficiency.³⁵ The

32. The Indian Country Extension Service asserts that "353,790 acres are in [Fort Berthold's] returned homestead area and farmed by private non-native farmers." *Fort Berthold Extension*, INDIAN COUNTRY EXTENSION, <http://www.indiancountryextension.org/extension/office/fort-berthold-extension> (last visited Feb. 24, 2012).

33. A tribal member, Ms. Theodora Bird Bear, asserts that "Mandaree and New Town . . . are starting to experience the impacts of industrial energy development via [oil and gas] wellsites, fracking, pipelines, roads, a high volume of truck traffic, noise, and dust." *North Dakota Flight Sparks Discussion on Impact of Oil Boom*, *supra* note 13. She also asserts "no local public discussion appears to recognize or give any value to the pre-existing landscape of wildlife, undisturbed prairie lands and badland-terrain on Fort Berthold." *Id.*

34. "Environmental justice has been defined as the pursuit of equal justice and equal protection under the law for all environmental statutes and regulations without discrimination based on race, ethnicity, and/or socioeconomic status." *What is Environmental Justice?*, THE ENVIRONMENTAL JUSTICE INFORMATION PAGE, <http://eelink.net/EJ/whatis.html> (last modified Apr. 6, 1997).

35. The 1886 agreement between the tribal people and the United States arguably confirms the public welfare and governmental purposes of their reserved lands. The agreement states the

tribe's past success in this regard provoked amazed comment from those social and economic experts who were asked by Congress, in 1949, to assess its progress toward the treaty goal. They declared the tribal people to be, by 1949, "in sight of complete economic independence."³⁶ Unfortunately, 1949 was also the year in which the federal government took the tribe's best agricultural lands as the site for its mammoth Garrison Dam and reservoir project.³⁷

The federal taking of over 156,000 acres of the tribe's best agricultural lands substantially impaired the tribal people's capacity to fulfill their treaty goals. Nonetheless, the tribe has made remarkable progress in its efforts, over the intervening sixty years since that taking, to recover from its most debilitating impacts.³⁸ Today, however, large-scale oil and gas development may again threaten to undermine the tribe's progress towards economic self-sufficiency. However, as discussed in section V, if the tribe can assert effective regulatory control over that development, then oil and gas development's most egregious risks and impacts may be avoided.

2. *Their Territorially-Based Rights of Sovereignty Within Fort Berthold*

The tribal people are also legally tied to Fort Berthold by those territorially-based sovereign rights they exercise within its geographic confines. Their sovereign rights arise from their status as a domestic, dependent nation under federal law. As a quasi-sovereign tribal nation, the tribal people have the right to govern themselves.³⁹ Their territorial sovereignty will be sorely tested by large-scale development on tribal lands, though, because development brings with it novel regulatory challenges that will test the tribal people's sovereignty in new ways. Further, the tribe will doubtless encounter substantial legal and political barriers if it seeks to

Indians will "become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry . . ." Act of March 3, 1891, ch. 543, 26 Stat. 989, 1032.

36. RONALD G. CUMMINGS, VALUING THE RESOURCE BASE LOST BY THE THREE AFFILIATED TRIBES AS A RESULT OF LANDS TAKEN FROM THEM FOR THE GARRISON PROJECT 6 (1986) (unpublished report) (on file with the author). The House Subcommittee on Public Lands concluded that the tribal people were, by 1949, "in sight of complete economic independence" due to their "strong and growing cattle industry and steadily expanding agricultural program." *Id.*

37. See Meyer, *supra* note 24, at 238.

38. See Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Pub. L. No. 102-575, § 3503, 106 Stat. 4600, 4732 (1992). Their recovery from the taking was spurred, in part, by the \$149.2 million in equitable compensation awarded to them by a 1992 congressional act. *Id.* § 3504. Congress required compensation be paid out of the hydro-power receipts derived from the future sales of electrical power from the Pick-Sloan generation plants, thereby effectively internalizing the compensation cost into that project's future operations. *Id.*

39. Williams v. Lee, 358 U.S. 217, 223 (1959).

regulate development within the reservation, particularly that development which will occur on fee status lands within the reservation.

3. *Their Socio-Cultural Ties to Fort Berthold*

The tribe's creation stories tell of how Lone Man and First Creator selected the Fort Berthold lands as the tribal people's permanent homelands.⁴⁰ By the people's continuing re-enactment of their cultural and religious practices, they strive to renew their ties to these lands and to help secure the creator's continued blessing for their good uses of those lands. Indeed, the tribal people's tenacious and steady efforts to use the entrusted lands for their common benefit have provoked an intriguing comment from one astute historian, Roy Meyer. He was amazed by the Three Affiliated Tribe's ingenious agriculturally based efforts to wrest a living from what some people regarded as a hostile and unforgiving environment. He attributed the tribe's success to their long-standing sense of duty and commitment to use these lands as a means of growing as a tribal people.⁴¹

Yet, today, even tough-minded economists do acknowledge a tribe's unique social and economic uses of their reserved lands can be taken into account when courts are called on to assess those lands' *in situ*,⁴² "or its natural and undisturbed," value to an affected tribal people.⁴³ Indeed, the

40. Joseph E. DeFlyer, *From Creation Stories to '49 Songs: Cultural Transactions with the White World as Portrayed in Northern Plains Indian Story and Song*, 2 *STUD. IN AM. INDIAN LITERATURE* 11, 11-12 (Spring 1990) (characterizing these Indian people as "the 'urban' people of the northern plains"). The tribes in what is now North Dakota "were traders, businessmen, and agriculturalists, with their sizeable villages located strategically in the center of a huge Northern Plains trading area." *Id.* DeFlyer recounts how First Creator and Lone Man cooperated to create the tribe's homelands. *Id.* at 12. He states the two creator figures divided up their responsibilities so that:

Lone Man create[d] the type of land and animals allied with the traditional Hidatsa and Mandan lifestyle of limited floodplain farming and fairly extensive hunting, while First Creator create[d] the type of land and animals allied with the modern whiteman's lifestyle of mechanical farming, and fenced, more intensive stock grazing. The tone of the story is light-hearted and satirical, though some people can, indeed, become angered or hurt by reference to the red-headed maggots as the progenitors of the white people.

Id. at 13.

41. Meyer, *supra* note 24, at 233. Historian Meyer concluded that the tribal people had made a "satisfactory adjustment to [a forbidding country and climate] during the centuries they had lived in the Upper Missouri Valley." *Id.* He also concluded that they had become "even more attached" to those lands over time and that they made full use of all the available resources of their reservation including "the wild game, the fruits and berries, the timber that grew in the river bottoms and along the tributary ravines, [and] the lignite coal found here and there in readily accessible form." *Id.*

42. *In situ* is latin for "in the natural or original position." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1170 (2002).

43. CUMMINGS, *supra* note 36, at 12-14. Natural resource economist, Ronald G. Cummings, asserts the United States Supreme Court has expanded the reach and scope of the substitute

Three Affiliated Tribe's people have persuaded Congress, through their presentation of expert economic studies and testimony, that their established aboriginal and treaty uses of their taken lands must be evaluated as representing dedicated governmental or public welfare facilities that are protected by an alternative valuation standard that is now known as the substitute valuation doctrine.⁴⁴

The tribe's distinctive ties to the Fort Berthold Indian Reservation distinguish and separate it from the rest of North Dakota. However, whether the tribe's distinctive ties to their homelands, as embodied by their unique sovereign and political rights within their reservation, can be adequately protected from development's overweening risks and impacts remains to be seen. The tribe, I contend, can protect those distinctive rights and interests through the development and implementation of those legal and regulatory initiatives that I discuss in my article.

B. FORT BERTHOLD'S LEGALLY-BASED DIFFERENCES FROM THE REST OF NORTH DAKOTA

Today, the tribe may exercise a degree of civil regulatory authority, but no criminal jurisdictional authority, over non-Indians' activities within the Fort Berthold Indian Reservation.⁴⁵ The jurisdictional reality is illustrated by the tribe's recent response to the deaths of four members of an Indian family. They lost their lives in a collision with an oil truck driven by a non-

valuation doctrine as it applies to unique or irreplaceable lands or resources that are not traded on any market or have elements of value that transcend market value. *Id.*

44. See S. REP. NO. 102-250, at 8-9 (1992) (recommending a do-pass for the "Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act"). Three Affiliated Tribes argued successfully that Congress, in its 1949 taking act, had significantly undervalued the tribe's resource base that had been taken as the site for the Garrison Dam and reservoir. *Id.* at 5-6. Therefore, the appropriate way to correct this mistake would be to regard the tribe's land related losses as an unpaid project cost. *Id.* at 9. The tribe argued that this unpaid project cost could, and should, be repaid out of the Pick-Sloan Project's excess power revenues. *Id.* The congressional sponsors of the tribe's equitable compensation bill had the following language, based on this recoupment principle, inserted into congressional report that accompanied this bill. That language reads as follows:

Paragraph 2 of [section 4(a) of Senate Bill 168] provides that deposits equal to 25 percent of the receipts from deposits to the United States Treasury for the preceding fiscal year from the integrated programs of the Eastern Division of the Pick-Sloan Missouri River Basin Project shall be deposited automatically into the fund each fiscal year. The amounts appropriated are to be non-reimbursable and non-returnable. [But] the aggregate amount of deposits into the Recovery Fund shall not exceed \$149,200,000.

Id. at 8-9. This stated compensatory principle was embodied, without any change, in the final compensation act. See Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Pub. L. No. 102-575, § 3503, 106 Stat. 4600, 4732 (1992).

45. See *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 195 (1978).

Indian employee of an oil company.⁴⁶ Given that the tribe lacks criminal jurisdiction over any non-Indian who violates its criminal laws, it chose to amend its existing tribal motor vehicle ordinance so as to assert its civil regulatory jurisdiction over those non-Indian vehicle operators who violate the civil ordinance's requirements.⁴⁷ However, even this modest assertion of tribal jurisdiction over non-Indian defendants will likely be vociferously challenged as outside the tribe's subject matter jurisdiction within Indian Country.

While this legal state of affairs may shock some people's conscience, it is not surprising given the unsettled state of today's federal Indian law. Federal Indian law refers to that body of federal law that includes Indian treaties, federal Indian statutes, federal Indian law decisions, Indian executive orders, as well as the administrative decisions and rules rendered by federal Indian agencies.⁴⁸ However, important for this article is the federal Indian law that governs a tribe's legal authority over non-Indian activities within Indian Country.

Briefly stated, the Three Affiliated Tribes, like other federally recognized Indian tribes, may exercise two types of jurisdictional authority over non-Indian defendants within Indian Country: jurisdictional authority that stems from its inherent sovereign rights as a quasi-sovereign entity under federal Indian law, and jurisdictional authority that stems from its federally delegated powers.⁴⁹ These two types of jurisdictional authority allow the Three Affiliated Tribes to exercise a fair degree of regulatory authority over non-Indians' activities within the Fort Berthold Reservation. However, a United States Supreme Court decision has restricted the tribes' inherent authority to regulate non-Indians' activities to two jurisdictional circumstances: when the regulated non-Indian activity arises from a consensual agreement between the non-Indian defendant and the tribe, or when the regulated non-Indian activity poses a direct and substantial threat to the tribe's health, welfare or political integrity.⁵⁰

Additionally, the Indian tribes may exercise certain federally delegated powers over non-Indian activities within Indian Country. For example,

46. *See Tribes Pass Special Resolution Enforcing Civil Motor Vehicle Code on Reservation Roads After Family of Four Dies on Highway*, MANDAN, HIDATSA, & ARIKARA NATION (Sept. 20, 2011), <http://64.38.12.138/News/2011/09/21/mha092011.pdf>.

47. *Id.* Tribal attorney Jennifer Fyten said the tribe has "civil jurisdiction and that the Tribe does intend to fully enforce the new Code and [tribal] law enforcement will stop, cite, investigate and possibly detain all individuals" who violate this law. *Id.*

48. The leading Indian law casebook defines federal Indian law as that "distinct body of law that regulates the legal relationship between Indian tribes and the United States." DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 1 (6th ed. 2011).

49. F. COHEN *HANDBOOK OF FEDERAL INDIAN LAW* § 4.01[1][a], at 206 (2005).

50. *Montana v. United States*, 450 U.S. 544, 555-56 (1981).

Congress has delegated to the tribes the authority to regulate specific environmental risks and impacts that may result from non-Indian development within Indian Country.⁵¹ However, Congress has not amended all of the federal environmental statutes so as to authorize the tribes to regulate all aspects of non-Indian development within Indian Country.⁵²

Therefore, the Three Affiliated Tribes will likely face an uphill legal battle if it seeks to hold oil and gas developers, as well as their employees, legally accountable for those wrongs they may inflict on the tribal people. However, I contend that it may, nonetheless, be able to develop and enforce a tribal energy policy that will enable it to regulate most aspects of oil and gas development on the reservation. I later describe how the tribe may act to accomplish this regulatory goal, as well as other goals, in the next several sections of my paper.

III. THE TRIBE'S THREE BIG CHALLENGES

Development experts urge energy rich tribes to enact policies that will enable them to manage development within Indian Country.⁵³ The experts assert these policies will help those tribes to maximize development's

51. Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 625 (1993). Royster states that:

[b]etween 1986 and 1990, three of the major environmental laws were amended to treat tribes as states (TAS). These TAS provisions were added to the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act: those federal environmental laws that encourage or mandate states to take primacy for the environmental programs established in the statutes. Tribes that meet certain statutory and regulatory criteria are delegated essentially the same authority to administer programs as a state.

Id.

52. *Id.* at 628 (concluding that the "tribal governmental regulation of the environmental effects of mining and related activities will generally extend beyond mineral development [on Indian lands] to reach all mineral development within the tribe's governmental boundaries, including mining on allotted lands and fee lands").

53. See MAURA GROGAN ET AL., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 41 (2011), available at <http://www.revenuewatch.org/publications/native-american-lands-and-natural-resource-development>. There is a mixed blessing to the development occurring on the Fort Berthold Indian Reservation. On the positive side, the tribe and its members have "been paid more than \$180 million" in energy-derived income. *Id.* But, on the negative side:

To say that the momentum of the Northern Plains' oil boom has overwhelmed the Three Affiliated Tribes is an understatement. For one, the reservation's infrastructure—particularly its roads—cannot adequately accommodate the increased traffic and heavy equipment accompanying the rush to develop the Bakken shale formation. In part to increase funding for infrastructure improvements, the tribe's reelection chairman, Tex Hall, has stated his interest in renegotiating the tribe's current 50/50 tax sharing arrangement with the state to an 80/20 split in favor of Three Affiliated.

Id.

benefits, and minimize its eco-social costs, to the tribal people.⁵⁴ Unfortunately, the experts do not say what those policies should look like or how the tribal governments can legally or practicably implement them.⁵⁵ Given this omission, their hortatory admonitions may be of limited value to the energy rich tribes.

However, my practical goal is to assess whether the Three Affiliated Tribes can, in fact, develop and enforce a tribal energy policy that will maximize development's benefits, and minimize its eco-social costs, to the tribal people of the Fort Berthold Indian Reservation. To do so, I argue the tribe must overcome three daunting barriers to its realization of this goal. For exposition purposes, I have re-characterized these three barriers as representing three big challenges.

First is the tribe's legal challenge. The Three Affiliated Tribes must effectively assert its inherent and statutorily conferred legal powers over oil and gas development throughout the Fort Berthold Indian Reservation. Second, the tribe has a strategic challenge. The Three Affiliated Tribes must maximize development's benefits, and minimize its eco-social costs, to the tribal people by adopting strategies that include: (1) a strategy for effective inter-governmental relations with the federal and state governments; (2) a strategy for effective financial and business action that will grow its oil and gas derived income into a permanent and diversified tribal wealth fund; and (3) a strategy of a new political and social engagements with its tribal communities as those responsible and active stakeholders who can use development's benefits as their means of growing their social and human capital resources. Finally, there is the tribe's governmental challenge. The Three Affiliated Tribes must establish an energy regulatory authority that can enforce the tribe's conservation-based rules so as to prevent the undue physical and economic waste of its oil and gas resources. The regulatory authority must also ensure the timely and effective prevention, or the subsequent remediation, of any significant development related damage to the tribe's waters, air, public health, livestock, or wildlife resources.

54. *Id.* at 6-7, 41.

55. *See id.* at 42 (noting "Indian nations and their lands exist in a strange legal status" but, unfortunately, not explaining how those tribes could, or should, use their distinctive legal status as a means of developing and implementing an appropriate set of tribal energy policies within Indian Country).

A. HOW THE THREE AFFILIATED TRIBES CAN MEET ITS
LEGAL CHALLENGE

1. *Overview*

In order to meet its legal challenge, the tribe must thoroughly evaluate its inherent and federally delegated authority to regulate development on the Fort Berthold Indian Reservation. The legal review should include: (1) a review of the tribe's 1886 treaty, as well as its other agreements, with the federal government; (2) a review of those federal environmental statutes, as well as any other relevant federal statutes, that may authorize the tribe to regulate development on the reservation; and (3) a review of those federal Indian law decisions that may affect the tribe's authority to impose its civil regulatory jurisdiction over non-Indian activities within the reservation. The purpose of this legal review is to provide the tribe with a reliable overall assessment of its potential authority to regulate development within the reservation.

At the practical level, the tribe should also evaluate its possible regulatory options whereby it can assert a reasonable measure of authority over all aspects of development on the Fort Berthold Indian Reservation. For example, the 2004 Model Oil and Gas Conservation Act,⁵⁶ as well as other regulatory models, are one possible option for its assertion of regulatory authority over development. However, any potential regulatory model would have to be significantly adapted to meet the tribal people's distinctive regulatory needs and interests on the reservation. The tribe may also seek the advice of those federal Indian agencies — such as the Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and Environmental Protection Agency (EPA) — that have the trust-based duty to assist the tribe in its efforts to protect its oil and gas resources from any unauthorized injury.⁵⁷

56. See David E. Pierce, *Minimizing the Environmental Impact of Oil and Gas Development by Maximizing Production Conservation*, 85 N.D. L. REV. 759, 766 (2009). Professor David Pierce views the 2004 Model Act as offering a “laudable improvement of exploratory unitization” But he nonetheless concludes that it “retains at its core the basic right to go-it-alone on a capture basis unless you can assemble a super-majority of like-minded working interest owners and royalty owners.” *Id.*; see also MODEL OIL & GAS CONSERVATION ACT (2004), available at <http://www.iogcc.state.ok.us/Websites/iogcc/docs/ModelAct-Dec2004.pdf>.

57. The U.S. Supreme Court has recognized the “distinctive obligation of trust incumbent upon the government” and that requires the government’s conduct to “be judged by the most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

2. *Analysis of the Tribe's Regulatory Authority over Development on the Fort Berthold Indian Reservation*

My brief legal analysis of the tribe's authority over development has to begin with its acknowledged proprietorship-based right to protect its lands and resources from unauthorized damage or depredation. Further, its proprietorship-based powers have been strengthened by Indian environmental and energy statutes.⁵⁸ Congress, for example, has recently amended most of the major environmental statutes so as to authorize the tribe to exercise regulatory authority over its environmental resources within Fort Berthold.⁵⁹ The tribe is now statutorily empowered to protect its lands, waters, air shed and wildlife within the reservation.⁶⁰

Additionally, there are other recently enacted federal Indian statutes that may provide an even stronger legal basis for the tribe's regulation of development within its reservation. These two potentially stronger statutes are the 1982 Indian Mineral Development Act (IMDA)⁶¹ and the 2005 Indian Tribal Energy and Self-Determination Act (ITESDA).⁶² The IMDA, for example, authorizes the Three Affiliated Tribes to set such terms and conditions in its development agreement as it may deem appropriate for the efficient and responsible development of its oil and gas resources.⁶³

58. See, e.g., Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08 (2006) (relating to Indian mineral statutes); Indian Tribal Energy and Self-Determination Act, 25 U.S.C. §§ 3501-06 (same); Clean Water Act, Pub. 33 U.S.C. § 1377 (providing tribes as states (TAS) amendments to federal environmental statutes); Safe Drinking Water Act, 42 U.S.C. § 300 j-11 (same); Clean Air Act, 42 U.S.C. § 7601(d) (same).

59. Royster, *supra* note 51, at 628 (asserting "tribal governmental regulation of the environmental effects of mining and related activities will generally extend beyond mineral development on Indian lands to reach all mineral development within the tribe's governmental boundaries, including mining on allotted lands and fee land").

60. Other Indian tribes, such as the Confederated Salish and Kootenai Tribe and Isleta Pueblo, have already exercised their newly delegated authority to establish stringent water quality standards to protect their various water sources within their respective reservations. See, GETCHES ET AL., *supra* note 48, at 640.

61. *Id.* at 587-88 (contending the IMDA authorizes the Indian tribes to enter into mineral development agreements that "provide for enhanced, environmental controls, or tribal employment preferences, education and job training programs, contracting of tribal businesses for related services such as road maintenance and security, and acquisition of equipment once production is completed").

62. See Shipp, *supra* note 22, at 56 (contending the ITESDA "creates a mechanism pursuant to which tribes may, ultimately, be allowed to grant energy-related leases (primary terms not to exceed ten years), enter into energy-related business agreements (terms not to exceed thirty years), and issue rights-of-way for pipelines and electric transmission facilities (not to exceed thirty years) involving tribal lands with specific approval of the Secretary of the Interior").

63. See Ogden, *supra* note 5 (stating the tribe has used its IMDA authority to enter into much more favorable energy development agreements; for example, the tribe's new energy leases under the IMDA has garnered it "bonuses in excess of \$700 per acre, drilling commitments and 22.5 percent royalty rate").

Not surprisingly, the tribe has already used its new statutory authority to shed its erstwhile role as the passive recipient of limited income payments (e.g., bonus lease payments, annual rental payments, or royalty based payments).⁶⁴ Today, the tribe has utilized its authority to enter into a wide variety of development agreements. Its goal is to now participate directly in the value added phases of oil and gas development. For example, the tribe has become the owner/operator of several of its oil and gas wells.⁶⁵

The best example of its new development role, though, may be its endeavor to construct the first tribally owned and managed oil and gas refinery in the nation. It has apparently received final federal project approval so that it can move forward with obtaining the capital financing that is needed for the project.⁶⁶ However, the bigger question is whether the tribe can leverage its new authority as its means for regulating development throughout the Fort Berthold Indian Reservation.

3. *How the Three Affiliated Tribes Can Leverage Its Authority to Regulate Development Throughout the Fort Berthold Indian Reservation*

The tribe has used its proprietorship-based authority to secure a larger share of the financial and employment-based benefits that have arisen from oil and gas development on the Fort Berthold Indian Reservation. However, it has not yet sought to ensure that its energy resources are developed in the most efficient and socially responsible manner possible. It could do so, in part, by its insertion of terms and conditions within its development agreements that would require developers to: (1) use the best available development protocols and extraction technologies that would help ensure the efficient and safe recovery of the tribe's resources; (2) adopt the best available management practices and environmentally friendly

64. See Chuck Haga, *It's in Their Hands*, RUNNING WITH OIL (Aug. 19, 2010), <http://www.runningwithoil.com/?p=46>. The tribe, pursuant to its new statutory authority, now negotiates directly with the oil and gas companies to obtain new tribal employment, training, and management responsibilities and opportunities in connection with the development of oil and gas resources on tribally owned lands.

65. *Id.* Malcolm Wolf, deputy director of the tribal energy department, told a recent visitor to a tribally owned and operated oil well, "We're in charge here We're doing our own leases, our own negotiations, our own pumping. It puts us in the driver's seat. Many of our people are having things they didn't have before, and that gives us a little more confidence in ourselves." *Id.*

66. See Reese Rogers, *Refinery Construction Begins on North Dakota Reservation*, STANFORD U. (Sept. 29, 2011), <http://www.stanford.edu/group/ruralwest/cgi.bin/drupal/energy/refinery-fort-berthold> (asserting the refinery "is a source of some pride now that the refinery is to be owned and operated by the Three Affiliated Tribes, providing jobs for tribal members and much needed income for the reservation").

technologies so as to avoid or minimize any environmental risks to surrounding Indian owned resources; and (3) incorporate by reference into its development agreements its evolving environmental and conservation related requirements that seek to ensure the responsible development of its resources.⁶⁷

The tribe may also seek the financial and technical assistance of the federal government to design and enforce a model tribal oil and gas conservation agreement. The purpose of a model agreement would be to ensure the efficient and socially responsible development of the tribe's oil and gas resources. Additionally, the tribe could also seek—through its use of various federal-tribal agreements (e.g., self-determination contracts, memoranda of understanding, or co-management compacts)—to assume the administration of the federal regulatory programs that oversee Indian energy development within the reservation. If sought and accomplished, the tribe could secure a larger participatory role in the responsible and coordinated development of all the Indian owned energy resources within the reservation.⁶⁸ However, while the tribe's proprietorship-based and statutorily delegated powers may well empower it to manage development on tribally owned lands, its powers may not authorize it to regulate development on the fee status lands within the reservation.⁶⁹

4. *How the Tribe Can Use Its Inherent and Federally Delegated Authority to Regulate Development on the Fee Status Lands Within the Reservation*

The tribe is legally authorized to assert its civil regulatory jurisdiction over certain developmental activities on fee status lands within the reservation. As a general rule, it is authorized to regulate any non-Indian activities that present a direct and substantial threat to the tribe's health, welfare, political or economic security.⁷⁰ Therefore, the tribe should evaluate those types of developmental activities, whether on fee status lands or not, that may pose a direct and substantial threat to a protected tribal

67. Royster, *supra* note 51, at 587-88.

68. GETCHES ET AL., *supra* note 48, at 241 (describing the larger tribal challenge as that of "[b]uilding a sustainable economy, competing with federal and state governments for jurisdiction and control over reservation resources and business activity, training the reservation workforce, [and] respecting tribal beliefs, traditions and values . . .").

69. While the tribe's inherent sovereign authority enables it to regulate development on Indian trust lands, it does not necessarily authorize the tribe to regulate development on non-Indian owned, fee status lands within the Fort Berthold Reservation. However, the tribe is authorized to regulate non-Indian development activity that poses a direct and substantial threat to that tribe's political or economic security." See *Montana v. United States*, 580 U.S. 544, 566 (1981).

70. *Id.*

interest. If the risk-based evaluation of those activities reveals any substantial threats to important tribal interests, the tribe should take the further step of determining what its regulatory response should be to either avoid or to mitigate those identified threats.

The tribe has two possible regulatory options whereby it can act to avoid or to mitigate a substantial threat to a protected tribal interest. Its strongest option, but also likely its most labor intensive option, may be to invoke its federally delegated regulatory powers under the federal environmental statutes.⁷¹ However, in doing so, the tribe may be required to develop, subject to EPA's approval and oversight, a comprehensive tribal environmental regulatory code that would cover its air shed, its waters, its wildlife, as well as its traditional cultural resources.⁷²

The tribe's more limited regulatory option, but also its more legally uncertain option, may be to assert civil regulatory jurisdiction over any non-Indian developmental activity that would present a direct and substantial threat to a protected tribal interest. Two recent federal appellate court decisions have upheld, in circumstances involving fairly egregious instances of non-Indian misconduct, tribal regulation of non-Indian activities within Indian Country.⁷³ However, in the absence of similarly egregious non-Indian misconduct, the Three Affiliated Tribes would likely have to present credible and detailed evidence that clearly demonstrates how and why a given non-Indian's conduct presents a direct and substantial threat to a protected tribal interest. Under this alternative tribal regulatory option, the tribe may even have greater remedial options, such as money damages, than may be available to it under the more limited remedial framework of environmental law.⁷⁴

The tribe faces a daunting legal challenge if it chooses to regulate oil and gas development on the Fort Berthold Indian Reservation. However, given its combined inherent and statutorily delegated powers, it does have a reasonable legal basis for its potential exercise of regulatory authority over

71. Royster, *supra* note 51, at 628 (contending that tribal regulation of the environmental effects of mining extends to "mining on allotted lands and fee lands").

72. See *EPA Tribal Policy and Initiatives*, EPA, <http://www.epa.gov/Indian/wetg/training/EPA/common/data/text-only/Old/epa01c.htm> (last visited Sept. 6, 2012).

73. See *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 939 (8th Cir. 2010) (upholding a tribal court jurisdiction over a tribal trespass claim against a non-Indian security firm, stating the security firm "threatened the health and welfare of the Tribe by organizing a physical attack . . . [on] the Tribe's facilities and the tribal members inside, including the duly elected council"); *White Mountain Apache Tribal Court v. Elliott*, 566 F.3d 842, 844 (9th Cir. 2009) (upholding tribal court jurisdiction over a non-Indian civil defendant who contributed to the largest fire in Arizona's history that destroyed 400,000 acres of lands and did millions of dollars in damage to the tribe's resources).

74. See *e.g.*, *Pubelo of Isleta v. Universal Constructors*, 570 F.2d 300, 303 (10th Cir. 1978) (noting trial court can "fashion a method for awarding damages").

many, if not all, of development's risks and impacts within the Fort Berthold Indian Reservation. The next section of my article addresses how the tribe can meet its equally daunting challenge of managing development's benefits for the good of its tribal people. While this Article has emphasized the tribe's role in managing development's costs and risks to the tribal people, the next part will focus on how it can meet its challenge of maximizing development's benefits to the tribal people. Specifically, I will argue the tribe can leverage development's benefits in a manner that will spur the growth of the tribal people's human and social capital resources.

B. HOW THE THREE AFFILIATED TRIBES CAN MEET ITS STRATEGIC CHALLENGES

1. *Overview*

Development experts tend to focus much of their attention on an energy tribe's wise management of its oil and gas derived income.⁷⁵ Wise management is an important issue, but I argue that an energy tribe can also leverage its income to achieve a much broader set of important strategic goals. Therefore, the Three Affiliated Tribes can, and should, use its energy-derived income as its means to achieve several strategic goals. It may do so, in part, by considering these following strategic initiatives: its strategy for effective inter-governmental relations, conducted on the basis of mutual respect and shared interests, with the state and federal governments; its strategy for using its governmental and corporate powers to leverage its oil and gas derived income into a permanent and diversified tribal wealth fund for the long-term benefit of its tribal people; and its strategy for engaging the tribal people and communities as socially and politically responsible stakeholders who must directly share in the task of rebuilding the tribe's families, economy, traditional cultural societies, and educational systems.

2. *The Tribe's New Inter-Governmental Relations Strategy*

As an energy rich tribe, the Three Affiliated Tribes may re-think its past inter-governmental relationships with both the state and federal governments. A reassessment is necessary because its strategic goals and

75. See GROGAN ET AL., *supra* note 53, at 56 (citing the Southern Ute Tribe's establishment of a permanent fund and growth fund that "invests energy royalties and casino profits in securities, which generate a steady revenue to pay for governmental and social services" and the tribe's distribution of "payments on a per capita basis as dividends to tribal citizens between the ages of 26 and 59, and as a retirement benefit to those 60 and older").

interests have likely changed given its new economic status as a leading energy tribe.⁷⁶ Of course, its inter-governmental relations should still be premised on the principle of mutual respect for the sovereign and legitimate interests of each of the participating governmental authorities including itself, North Dakota, and the federal government.

The tribe has enjoyed a longstanding government-to-government relationship with the federal government.⁷⁷ However, it has had a more uneven, and sometimes contentious, relationship with North Dakota.⁷⁸ Due to the large scale energy development that is now occurring in western North Dakota and on Fort Berthold, the tribe will have to work with the state to ensure the efficient and responsible development of their shared energy resources. For that reason, a renewed and more effective inter-governmental relationship between the tribe and state may be one means of achieving their goals without undue legal or political differences.

However, the tribe should recall that there are different considerations at play in its relations with the federal government, on the one hand, and North Dakota, on the other hand. Its renewed inter-governmental relationship with federal Indian trust agencies — particularly the BIA, the BLM, and the EPA — will be governed by an established and relatively formal regime of inter-governmental consultations and resulting agreements. For example, this system of relations will likely be conducted through tribal-federal consultations, legally binding memoranda of understanding, tribal self-determination contracts, negotiated tribal

76. *Id.* at 39-40.

77. The tribe's long standing relationship with the United States is confirmed in author Paul VanDevelder's recounting of how "Captains Meriwether Lewis and William Clark, the leaders of Thomas Jefferson's Corps of Discovery," were welcomed to the Mandan and Hidatsa villages in the winter of 1805. See PAUL VANDEVELDER, *COYOTE WARRIOR: ONE MAN, THREE TRIBES AND THE TRIAL THAT FORGED A NATION* 7 (2004).

78. See *id.* at 187. Author Paul VanDevelder describes North Dakota's contentious relationship with the Three Affiliated Tribes during that long and drawn out litigation cycle of cases involving the tribe and Wold Engineering. *Id.* See generally *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986); *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984). Chief Justice VandeWalle of the North Dakota Supreme Court described the impact of these cases on tribal-state relations in North Dakota as follows:

When *Wold Engineering* came in the door, I remember thinking "Oh brother, here comes the train wreck." This was going to be a watershed case, a referendum on Public Law 280, no doubt about it. So we told the tribe we have no jurisdiction to resolve this thing. The only way we could hear this case was if the tribe waived its sovereign immunity. Short of that, we couldn't give them relief. They had to take it to the U.S. Supreme Court.

VANDEVELDER, *supra* note 77, at 187.

regulatory standards, and the occasional tribal testimony before Indian congressional committees.⁷⁹

By contrast, its renewed inter-governmental relations with North Dakota will be likely conducted through an informal system of occasional tribal-state consultations wherein the participants may discuss issues of common jurisdictional or regulatory concern.⁸⁰ In more rare instances, the tribe and state may be motivated to enter into a formal legal agreement. For example, the two entities recently signed an oil and gas tax sharing agreement.⁸¹ Both parties deemed the agreement necessary to avoid the risk of the burdensome double taxation of those energy producers who are active within the Fort Berthold Indian Reservation.⁸² The agreement also avoided the situation wherein each government imposed its own severance or production taxes on those activities within that reservation.⁸³ Under the tribal-state agreement, a single, shared tax is imposed on energy production within the reservation.⁸⁴

However, the tribe's most important inter-governmental relationship will continue to be its trust-based relationship with the federal government. While the tribe has made some progress in renewing the basis of its relationship with the federal government—particularly with regard to its efforts to reduce some of the federal regulatory barriers to the development of its oil and gas resources—there still remain significant administrative bottlenecks that tend to delay, if not frustrate, the timely and responsible

79. GETCHES ET AL., *supra* note 48, at 222 (praising Congress' tribal self-determination initiatives which authorize the Indian tribes to "administer virtually all functions and activities now performed for them by the BIA or Indian Health Service").

80. See generally Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007) (encouraging Indian tribes to cautiously engage in an on-going system of tribal-state relations as one means of achieving their strategic objectives).

81. OIL AND GAS AGREEMENT BETWEEN THE THREE AFFILIATED TRIBES AND STATE OF NORTH DAKOTA, available at www.ndgov/tax/oilgas/threetribe/pub/oilgastaxagreement. [hereinafter OIL AND GAS AGREEMENT].

82. *Id.* at 2-3; see also N.D. CENT. CODE ch. 57-51.2.

83. See N.D. CENT. CODE § 57-51.2(2).

84. See *Tribes Ask for Bigger Share of ND Oil Tax*, BISMARCK TRIB., Feb. 5, 2011, at B1, available at http://bismarcktribune.com/news/local/govt-and-politics/2011-session/article_c6af5766-30aa-11e0-b74b-001cc4c002e0.html. However, the current tribal chairman, Tex Hall, wants to renegotiate its tax sharing agreement with North Dakota. Under the existing 2008 agreement, the state gets eighty percent of the tax revenue from oil production on fee lands within the reservation and fifty percent of the tax revenue from production on tribal trust lands. *Id.* Chairman Hall wants to amend that agreement so that the tribe would receive eighty percent of the tax revenue from tribal trust lands. *Id.* He contends the increased tribal responsibility for road repair and maintenance, protecting the public health, and employing more tribal staff justifies the amendment to the tax sharing agreement. *Id.* From September 2008 to December 2010, the state received about \$47.8 million in tax revenues on the reservation and the tribe received about \$21.3 million. *Id.* State senator John Warner has recently introduced legislation seeks to amend the existing state-tribal tax sharing agreement. *Id.*; see also OIL AND GAS TAX AGREEMENT, *supra* note 81.

development of the tribe's energy resources. The tribal chairman's recent testimony before a congressional subcommittee detailed several of these concerns.⁸⁵ Those unresolved federal regulatory issues include:

1. Improve the staffing at the Fort Berthold Agency and the Great Plains Regional Office so that all the responsible federal agencies are located in one place and they are thereby able to coordinate their respective functions and, hopefully, speed up the oil and gas exploration and leasing process on the reservation;⁸⁶

2. Appoint an allottee liaison so as to improve the communication process between the Interior Department and the 8000 allotted mineral owners on the reservation;⁸⁷

3. Streamline the regulatory process by requiring the standardization among the various federal agencies of the tribal and allottee lease numbers so that there will not be differing lease numbers assigned to the same parcel of allotted or tribal land on the reservation;⁸⁸

4. Modernize the Interior Department's record keeping system so that fewer land title mistakes are made in the future and upgrade the Department's filing and tracking system for leases, applications, and related approval requests;⁸⁹

5. Develop a large scale infrastructure solution that will ensure the collection and transportation of oil and gas produced by both the tribal and allotted wells on the reservation;⁹⁰

6. Ensure greater regulatory coordination with North Dakota so that all the oil and gas operators are certain as to which government—tribal, state, or federal—has regulatory jurisdiction over a given operator;⁹¹

7. Improve the federal decision-making process through the development of a memorandum of understanding as between the four responsible federal agencies that share jurisdiction over oil and gas development on the reservation;⁹² and

85. *Oversight Hearing on Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands Before the H. Subcomm. on Indian and Alaska Native Affairs Committee on Natural Resources*, 112th Cong 18-15 (2011) [hereinafter *Oversight Hearing*] (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, & Arikara Nation of the Fort Berthold Reservation).

86. *Id.* at 21-22.

87. *Id.* at 22.

88. *Id.* at 22-23.

89. *Id.* at 23.

90. *Id.*

91. *Id.*

92. *Id.*

8. Ensure that any allotted mineral owner who is subject to a communitization agreement is paid her royalties at the same time as a non-Indian mineral owner who is in the same circumstances.⁹³

The fair resolution by the federal government of these pending issues will help the tribe to better manage development on the reservation.

The tribe has already acted to leverage its energy resources as its means of establishing new strategic relationships with both the state and federal governments. However, these new relationships have to be both nurtured and vigilantly monitored to ensure that the tribe's interests are always respected and protected. As a practical reality, the tribe's relationship with the state will always be limited and episodic in nature. At most, the tribe will likely participate in informal consultations with the relevant state officials wherein information may be exchanged regarding each government's respective development programs or their new regulatory initiatives. Far more rarely, given the tribe's appropriate sovereignty-based concerns, will the tribe and the state likely enter into any inter-jurisdictional or resource sharing agreements.⁹⁴

By contrast, the tribe should seek to strengthen both its informal and formal relations with the federal government. Its abiding legal and practical interests behoove it to secure from the federal government the funding, technical support, and federally derived authority that will enable it to better manage development on the Fort Berthold Indian Reservation. Therefore, given its two hundred years of relationship with the federal government, the tribe should seek to build upon its most important and enduring inter-governmental relationship. However, the tribe should conscientiously develop this relationship as only one of its means of realizing its strategic goals within the overarching framework of the federal trust relationship.⁹⁵

3. *The Tribe's Strategy for Using Its Governmental and Corporate Powers to Accomplish Its Long-Term Goals*

Development experts and legal scholars have counseled the energy rich tribes to wisely manage their sometimes substantial energy derived

93. *Id.*

94. Fletcher, *supra* note 80, at 80 (asserting that "[i]n the case of modern intergovernmental agreements, Indian tribes are not conceding jurisdiction over their entire territories to states—they are settling questions of jurisdictional dispute with the states by creating certainty through agreements where federal Indian law offers nothing more than gray areas").

95. See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 280-81 (2005) (describing the tribes' challenge of "sovereignty building" whereby they must become "doggedly persistent in the gargantuan task of piecing [their] societies back together").

income.⁹⁶ Unfortunately, some energy rich tribes have failed to heed that counsel. Therefore, when the predictable energy bust does come, some tribes have little to show for the millions of dollars they may have received in energy derived income during the erstwhile energy boom. The Three Affiliated Tribes, given the first initial phases of development occurring on its reservation, can hopefully avoid a similar fate. Because much has been said about how a tribe should manage its energy derived income, I will focus my analysis on how the tribe can leverage its energy derived income to accomplish its other important strategic goals.⁹⁷

Given its status as an IRA-chartered entity,⁹⁸ the Three Affiliated Tribes has significant governmental and corporate powers that it can leverage to achieve several strategic goals that may benefit its tribal people. Pursuant to section 17 of the IRA, it can charter a tribal development corporation that may be authorized to exercise an independent and professional business judgment in its management of tribal assets that have been entrusted to its administration.⁹⁹ Indeed, the tribe has apparently used

96. Tribal wealth management—whether the wealth is derived from gaming or energy development—is a hot topic in Indian Country. At the macro-level, wise management of tribal wealth has “generated some 75,000 new jobs for tribal members . . . [and tribal wealth has] been funneled into many nongaming tribal ventures: museums, banks, hydroelectric dams, farms, hotels, restaurants, and grocery stores.” *Id.* at 337. At the micro-level, for example, the Poarch Band of Creek Indians’ decision to invest its tribal wealth in several “tribal enterprises, starting with a Best Western motel and restaurant on Interstate 65.” *Id.* at 342.

97. In general, the tribe may seek to emulate those strategic successes that have been realized by the Southern Ute Tribe in its management of its energy resources. Its financial success derives from its conscientious establishment of several tribal development corporation. One of these tribal corporations—known as the Red Willow Production Company—now “owns interests in nearly 1,000 [oil and gas] wells and works about half of those, making it one of the top natural gas producers in Colorado.” *Id.* at 347. Furthermore, he asserts that another tribal corporation—Red Cedar Gathering Company—“now owns more than 700 miles of pipelines, moving about [one] percent of the nation’s daily natural gas supply.” *Id.*

98. Karen Atkinson and Kathleen Niles describe the general powers of IRA chartered tribal corporation as follows:

Section 17 corporations are tribal in character, they must be wholly-owned by the tribe and are essentially alter egos of the tribal government. . . . The corporate charters may convey the following powers to the incorporated entity:

- Power to buy and sell real and personal property; including the power to purchase restricted Indian lands
- To enter into leases or mortgages of tribal land for a term of 25 years without Section 81 approval by the Secretary of the Interior
- To enter into contracts or agreements without Section 81 approval by the Secretary of the Interior
- Further powers as may be necessary to the conduct of corporate business.

See KAREN J. ATKINSON AND KATHLEEN MILES, *TRIBAL BUSINESS STRUCTURE HANDBOOK* III-12 (2008), available at www.irs.gov/pub/irs-tege/tribal_business_structures_handbook.pdf (internal footnotes and quotations omitted).

99. S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 689 (2010). Tribes should also consider having their business enterprises “run by a politically autonomous

this authority to establish a tribal development entity, known as Missouri River Resources. This tribal business entity — according to its organic documents — is intended to perform the same development functions that have been so successfully performed by some of the Southern Ute Tribe's development corporations.¹⁰⁰

However, while some tribal development corporations have become extremely successful business institutions, many other tribal development corporations have either floundered or failed. Indian development experts have offered no sure fire managerial recipe that will make a particular tribal development corporation successful, but there are at least two essential ingredients to a successful tribal enterprise: (1) an unswerving commitment to obtaining what the tribal people will need to survive and flourish and (2) the tribal leadership's incorruptible and unyielding will to bend its governmental and corporate powers to the realization of this long-term goal. Furthermore, the tribe's leadership must objectively identify and empower only those tribal enterprises that have a demonstrated capacity to contribute meaningfully to the realization of the tribe's overarching strategic goal.¹⁰¹

Therefore, the tribe, in assessing its alternative corporate-based opportunities, has to carefully determine which of those opportunities can serve as a vehicle for achieving its long-term goals. For example, the tribe could assess whether North Dakota's establishment of its Legacy Fund — its vehicle for the investment of a significant portion of its energy revenues into a permanent and diversified wealth fund — ¹⁰² should serve as a model

body . . . separate from the tribal governing body." *Id.* at 693. But, regardless of how the tribal businesses are structured, they must lay "the framework for the consistent assertion and protection of tribal sovereignty." *Id.* at 695.

100. See MISSOURI RIVER RESOURCES, BUSINESS PLAN 5 (Dec. 2010), available at http://missouririverresources.com/files/mrr_Business_Plan_pdf. The tribal business plan for this company, Missouri River Resources, states that the tribe "wish[es] to proceed with the formation of a [t]ribal oil and gas company to allow the [tribe] to actively participate in the exploration of the oil and gas resources located on lands within the Fort Berthold reservation, and to gain greater control over the development of the resources." *Id.* The tribe's overall goal is "to build an oil and gas exploration and production company, with initial recoverable reserves of 500,000 Bbl." *Id.* The tribe's hope is that this company "will provide a significant base for the [t]ribe to increase control over the oil and gas activities on the [r]eservation, develop a legacy for future growth and expansion, and provide quality opportunities for Tribal members to participate in this dynamic venture." *Id.*

101. Thompson, *supra* note 99, at 714 (acknowledging the tribes' new corporate endeavors increase the "risk of direct challenges to their sovereignty" and remarking on the irony that it has been "tribal sovereignty and self-determination . . . that have enabled [tribal] economic growth").

102. See *Legacy Fund Gets Its Start*, BISMARCK TRIB. (Sept. 13, 2011), http://bismarcktribune.com/news/opinion/editorial/legacy-fund-gets-its-start/article_65cef2e0-dd56-11e0-983a-001cc4c03286.html. North Dakota voters approved the establishment of the North Dakota Legacy Fund. Indeed, the first deposit, some \$34.3 million, has already been placed into that fund. *Id.* By the fund's terms, none of the deposited monies can be spent until June 2017 and, in any event, no more than fifteen percent of those funds can be spent in any biennium. *Id.* However, some critics have asked why those monies are deposited in an account with the Bank of

that it may choose to emulate. The fund's strategic goal is to leverage today's state energy revenues as its long-term means to create new and better social and economic options for both its present and future generations of North Dakotans.¹⁰³ Similarly, the tribe could choose to use its oil and gas income as its means of leveraging the tribal people's future social and economic options. These leveraged options could include better tribal educational opportunities, improved tribal health care, an adequately funded tribal land consolidation initiative, and more tribal funding for individually owned business enterprises. However, some Indian development experts emphasize that a majority of the tribal people must buy in to any proposed tribal development strategy. Only if the tribal people are persuaded that a given tribal development strategy is governed by an incorruptible and unyielding commitment to the improvement of their lives, will they give it their unqualified support.¹⁰⁴

4. *The Tribe's Strategy for Building Its Human and Social Capital Resources*

The tribe may direct some portion of its energy derived income to the building of the tribal people's human and social capital resources. Development experts have not said much about this tribal strategic opportunity, but it may be the tribe's most important strategic goal. To achieve this goal, the tribe must engage its tribal people as those politically and socially responsible stakeholders who will be directly responsible for the rebuilding of the tribe's families, communities, and traditional cultural associations. How the tribe can leverage its energy resources so as to develop the tribal people's human and social capital resources is discussed in the following sections.

a. *Articulating Its Strategic Vision*

The tribe can accomplish its strategic goal through the establishment of an appropriately capitalized and professionally managed tribal wealth fund, but this initiative can only succeed with the tribal people's understanding and assent. Therefore, it may, via several reservation-wide forums, engage the tribal people in a frank and open discussion as to what a proposed tribal

North Dakota that earns only one percent interest. *Id.* There is considerable optimism about the fund's future given that "[d]aily crude oil production hit 423,550 barrels in July [2011], 40,000 barrels a day more than in June." *Id.*

103. *Id.*

104. WILKINSON, *supra* note 95, at 280 (contending the "combination of public involvement and accountability requires [tribal] elected officials to do much walking of the membership, as it is called, and contributes to a buy-in by the membership of tribal decisions").

wealth fund should look like and how it should be administered. There will likely be some tribal members who advocate for the immediate per capita-based payment of the tribe's energy derived income to the tribal people. In response, the tribe may choose to immediately devote some of its energy derived income to fund small tribal opportunity grants or loans that will enable qualified tribal members to directly participate in the new oil and gas industry. Through its provision of targeted grants or loans, the tribe can help tribal members who want to start small business enterprises, who want to obtain the required technical training and skills to compete in the energy industry, or who want to obtain tools and equipment that are required for work in that industry. By assisting its qualified tribal members in their efforts to participate in the new energy economy, the tribe can demonstrate its commitment to building its people's capacity to directly benefit from this new industry on the reservation.

Only through its steadfast adherence to its overall strategic goal can the tribe successfully use any given means, such as a tribal wealth fund, to leverage the development of the tribal people's human and social capital resources. In this light, the tribe's new oil wealth will serve as its strategic foil for provoking the tribal people to debate and discuss how they can, and will, participate in the achievement of this overarching strategic goal.¹⁰⁵ In the next section, I describe how the tribe may seek to engage its tribal members as direct stakeholders who have a legitimate right to participate in the design of the tribe's plan for the future use of its revenues derived from oil and gas development on the Fort Berthold Reservation.

b. Power Sharing with the Tribal Communities

The tribe can also leverage its energy resources as a means of encouraging the tribal communities and the traditional culturally-based associations to take greater responsibility for managing development's impacts and risks on the reservation. Although the tribe's IRA charter and constitution seemingly centralizes governmental and corporate decision making within the tribal council,¹⁰⁶ the centralization does not prohibit the

105. See WILLIAM ISAACS, *DIALOGUE AND THE ART OF THINKING TOGETHER* 272-73 (1999) (contending that any people or group, including tribal people, will benefit from the practice of "reflective dialogue"). The reflective dialogue-based process requires all of the participants therein to reflect on what they are doing and the impact they are having on others. *Id.* "People [in this dialogue] are now willing to examine the rules that have governed how they have operated. They are prepared to begin to explore the nature of the structures that guide their behavior and action, and they do so increasingly publicly." *Id.*

106. See Corporate Charter of the Three Affiliated Tribes of the Ft. Berthold Reservation, N.D., ratified Apr. 24, 1937; Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation art. VI.

tribe from taking affirmative and voluntary actions to share its decision-making powers with those tribal communities and groups that will bear the brunt of future development on the reservation. Its power sharing efforts can also serve to rebalance, in a culturally and politically appropriate manner, the IRA's overly centralized governmental structures. Therefore, the tribe may consider the following steps toward a new political engagement with its tribal members.¹⁰⁷

The first step is power sharing with the unduly impacted tribal communities and groups. The tribe may accord to those heavily impacted tribal communities and groups a decision-making role in the design of a tribal energy policy that is intended to mitigate development's intrusive effects. Beyond this power sharing step, the tribe may consider how it can empower other tribal communities and groups — through, for example, the tribal chartering and funding of new community development associations — so that they too can take a greater responsibility for building the tribal people's human and social capital resources.¹⁰⁸

The second step is engagement with the younger tribal members. The tribe may also leverage its energy resources as its means for engaging its most gifted and qualified young tribal men and women. It could, for example, stimulate their commitment to tribal public service through targeted employment and internship opportunities with the various tribal energy focused departments and agencies. These tribal efforts would seek to grow a cadre of new, young tribal administrators and leaders who would, over time, become qualified to lead the tribal people towards their new economic and social future. Furthermore, this tribal effort would contribute to building those young people's social and technical skills so as to qualify them for future leadership positions within the tribal government.¹⁰⁹

The tribe's success in leveraging its energy resources to achieve its strategic objectives is—as has been observed by development experts—as crucial to both the maximization of development's benefits and the minimization of development's costs to the tribal people.

107. The tribe, for example, may want to adopt the suggested democratic mechanism of a tribal referendum on "large [tribal] expenditures and matters of great importance . . ." WILKINSON, *supra* note 95, at 280.

108. "Sovereignty building," as Charles Wilkinson calls it, is the joint responsibility of the tribal people and their leadership. He quotes law professor Frank Pommersheim who describes this process as embodying the "legal and ethical thrust of [the] Indian people to develop and to improve their institutions and government . . ." *Id.* at 283.

109. *Id.*

V. THE TRIBE'S GOVERNMENTAL INITIATIVE TO REGULATE DEVELOPMENT ON THE FORT BERTHOLD INDIAN RESERVATION

Large-scale oil and gas development, even on the Fort Berthold Indian Reservation, can be managed in a legally and socially responsible manner. However, the Three Affiliated Tribes, due to its quasi-sovereign status within the reservation, is the only entity with the will and the interest to take on this challenge. Indeed, the tribal chairman, in his recent congressional testimony, expressed the tribe's goal of maximizing development's benefits, while minimizing its eco-social costs, to the tribal people of this reservation.¹¹⁰ His testimony restates the overarching rationale that is now routinely invoked to justify governmental regulation of oil and gas development throughout the United States.¹¹¹

A. EFFICIENCY AND FAIRNESS AS THE BASIS FOR TODAY'S GOVERNMENTAL REGULATION OF OIL AND GAS DEVELOPMENT

The tribe, like other responsible governments, seeks to balance two potentially conflicting governmental goals. First, it seeks to ensure that development is done in a reasonably efficient manner that will avoid any undue physical or economic waste of its energy resources. Second, it seeks to ensure that development does not cause any undue environmental or other harm to the tribal people or their lands and resources.¹¹² Not surprisingly, virtually all contemporary resource conservation laws likewise express this goal of balanced resource development. These laws, for example, routinely prohibit any resource development that will cause undue harm to the surrounding environment.¹¹³

110. *Oversight Hearing*, *supra* note 85, at 19. Chairman Hall, in his testimony before a congressional oversight committee that was conducting a hearing on energy development on Indian lands, made these following remarks:

As the [c]hairman of the MHA Nation, I now have the responsibility for our tribal lands as well as our individual Indian lands. Our focus must be on maximizing the economic benefit that the MHA Nation and its members can receive from the oil and gas resources under our lands. At the same time, our lands must be protected by appropriate federal and tribal regulations, adopted and enforced on a cooperative basis, which protects our environment and our people.

Id.

111. State oil and gas conservation laws strive to balance the goal of resource development with the goal of environmental protection. Whether these state conservation laws actually realize a fair balance between these competing goals is a matter of on-going debate. See U.S. DEP'T OF ENERGY, STATE OIL AND NATURAL GAS REGULATIONS DESIGNED TO PROTECT WATER SOURCES 8 (May 2009), available at <http://www.gwpc.org/e-library/documents/general/State%20Oil%20and%20Gas%20Regulations%20Designed%20to%20Protect%20Water%20Resources.pdf>.

112. *Oversight Hearing*, *supra* note 85, at 19.

113. U.S. DEP'T OF ENERGY, *supra* note 111, at 6.

But, as a practical reality, the degree to which any given government actually enforces this regulatory ideal, through its on the ground application of its conservation policies and practices, depends on its underlying social and economic priorities.¹¹⁴ Similarly, the Three Affiliated Tribe's conservation-based initiatives will likely be somewhat influenced by its own evolving economic and social priorities with regard to development on the Fort Berthold Indian Reservation. The tribal people's direct interest in ensuring the wise use and investment of these tribal oil revenues will likely motivate them to fully participate in an on-going tribal dialogue regarding the best use of these funds.

B. WHAT THE TRIBE CAN LEARN FROM ITS REVIEW OF OIL AND GAS CONSERVATION LAWS

The tribe, as its initial regulatory step, should review the general regulatory structure of contemporary oil and gas conservation laws. As a general matter, today's state resource conservation laws share a remarkably similar regulatory structure. This similarity is evidenced by their typical provisions regulating: (a) the permitting process for oil and gas wells; (b) well construction standards; (c) the hydraulic fracturing process; (d) the temporary abandonment of oil and gas wells; (e) the plugging of oil and gas wells; (f) oil and gas storage tanks; (g) the construction and maintenance of waste or other types of pits; and (h) waste handling and spills.¹¹⁵

Furthermore, these state conservation laws routinely delegate to their respective regulatory agencies the job of managing the energy industry within their states. These agencies, as part and parcel of their delegated regulatory authority, are empowered to develop detailed regulations as their means of enforcing their respective state's conservation laws. Therefore, they carry out their regulatory duties through the medium of detailed regulations, formal and informal guidance documents, local field rules, and an evolving set of best management practices. Furthermore, they conduct field inspections and related regulatory oversight, which may include the actual witnessing of significant operations such as well construction, testing, and plugging.¹¹⁶

However, some critics do argue that the dual regulatory goals of resource development and environmental protection have proven, in practice, to be inherently incompatible. They further contend that the states' regulatory agencies tend to be biased in favor of energy production

114. *Id.*

115. *Id.*

116. *Id.*

and against the reasonable needs of environmental protection.¹¹⁷ For that reason, the tribe may want to consider some additional environmental safeguards as its means of balancing the possibly competing goals of resource development and environmental protection on the reservation.

C. WHAT ENVIRONMENTAL SAFEGUARDS WILL ADEQUATELY
ADDRESS THE DISTINCTIVE SOCIAL AND ENVIRONMENTAL NEEDS
OF THE FORT BERTHOLD INDIAN RESERVATION

The tribe may consider, as its second regulatory step, the following environmental safeguards that seek to achieve a balance between promoting development, on the one hand, and protecting the environmental interests of the tribal people, on the other hand. These environmental safeguards may also directly address those distinctive risks that are presented by types of oil and gas extraction technologies—horizontal drilling and hydraulic fracturing—that are now in use on the reservation.¹¹⁸ These suggested safeguards include the following:

1. Protection of tribal surface owners' rights: The tribe may require developers to protect tribal surface owners by giving them advance written notice (e.g., thirty days prior to any proposed surface disturbance) of any proposed surface disturbance and by paying them damages for any loss of income due to crop loss or for other injuries to their surface resources;¹¹⁹
2. Protection of tribal and allotted water supplies: The tribe may require developers to protect tribal or allotted water supplies from pollution or undue waste by conducting appropriate water quality and quantity studies of development's impact on tribal and allotted water supplies, both before and during the development process;¹²⁰
3. Protection of tribal and allotted ground water supplies from contamination by the hydraulic fracturing process: The tribe may require developers to protect tribal and allotted groundwater supplies from any contamination from the hydraulic fracturing process through their adherence to adequate well casing and cementing standards;¹²¹
4. Protection of tribal air resources: The tribe may require developers to use the best available technologies and industry practices

117. *Id.* at 8.

118. See ARK. PUB. POLICY PANEL, MODEL OIL AND GAS LAWS, REGULATIONS AND ORDINANCES 1 (Mar. 2011), available at <http://www.ARPANEL.org/content/Model%20Gas%20Laws.pdf>.

119. *Id.*

120. *Id.*

121. *Id.*

to reduce or eliminate any health related threats to the tribal residents from any emissions that occur during the development process;¹²²

5. Protection of tribal residents from undue noise: The tribe may require developers to protect tribal residents from any undue noise that may occur during the development process through their adherence to an appropriate noise standard (e.g., a standard measured in decibel units);¹²³

6. Tribal well inspection requirements: The tribe may require a well to be inspected prior to production, while hydraulic fracturing is occurring on a well, and before a well is reclaimed;¹²⁴

7. Disclosure of drilling chemicals used in the hydraulic fracturing process: The tribe may require developers to disclose the Chemical Abstract Service (CAS) number and the volume of each substance used by those developers in the hydraulic fracturing process;¹²⁵

8. Well site reclamation requirements: The tribe may require developers to ensure the timely reclamation of any abandoned well site by the posting of a bond that is equal to the cost of plugging and reclaiming any abandoned well site;¹²⁶ and

9. Best management practices requirements: The tribe may require developers to use the best available technology and management practices so as to minimize any risks or threats to the tribal environment.¹²⁷

The tribe should assess whether, given the local conditions that govern oil and gas development on the Fort Berthold Indian Reservation, all of these environmental and health related requirements may be necessary to protect the interests and rights of the tribal residents. Further, the tribe may consult with the BIA, EPA, and BLM to determine whether the federal government's existing regulatory structure that governs oil and gas development deals adequately with these environmental and health related interests on the reservation. The tribe, like other responsible governments, understandably seeks to balance its development and conservation goals. Striking the right balance between these sometimes competing goals requires the tribe to exercise its regulatory discretion in manner that gives due consideration to each of these respective goals.

122. *Id.*

123. *Id.*

124. *Id.* at 2.

125. *Id.*

126. *Id.*

127. *Id.*

VI. CONCLUSION

The tribe has already taken some important regulatory steps. It has, for example, established a tribal energy office that now performs important data gathering functions.¹²⁸ It also serves as a liaison between the oil and gas developers, the tribal mineral rights owners, the federal government, and the tribal people.¹²⁹ The tribe has also adopted an interim Hazardous Waste Disposal ordinance that seeks to deter the unauthorized dumping or disposal of any waste materials from the exploration or production of oil and gas on the reservation.¹³⁰ However, the tribe may have to take further and more substantial regulatory steps if it wants to ensure that development is regulated in a legally and socially responsible manner on the Fort Berthold Indian Reservation. To do so, the tribe would likely confront a complex and potentially costly undertaking, but, as I have recommended, the tribe could accomplish its strategic goals in a deliberate and incremental fashion.

Furthermore, whether the Three Affiliated Tribes will prove to be development's victim or its beneficiary will depend on its success in subjecting oil and gas development to reasonable legal and social regulation. If it succeeds in this effort, the tribal people can use development's many benefits to help ensure a brighter social and economic future for themselves and for their future generations. If it does not succeed in this effort, development's growing risks and impacts may jeopardize the progress the tribal people have made in their recovery from the disastrous effects of the Garrison Dam taking some sixty years ago.

However, there is reason for optimism because both the federal and state governments have an important stake in helping the tribe regulate oil and gas development on the Fort Berthold Indian Reservation. Given that these two governments are motivated by their interest in ensuring the responsible development of the Bakken formation, they may also acknowledge the tribe as an indispensable regulatory partner in the realization of this common goal.

128. See e.g., Ogden *supra* note 5.

129. GROGAN ET AL., *supra* note 53, at 41 (asserting the tribal energy office "acts mostly as a facilitator and clearinghouse, communicating . . . [with the relevant federal and state energy regulatory offices] . . . on behalf of the tribe").

130. See THREE AFFILIATED TRIBES ENVIRONMENTAL CODE ch. 15.1 (2011) (on file with author).
